QUESTION PRESENTED

Whether a district court judge, when determining a sentence outside the Guidelines range, should be required to provide a justification in proportion to the deviation in order to fulfill the "reasonableness" standard under *United States v. Booker*, 543 U.S. 220 (2005). This Court recently heard argument on the same issue in the case of *Gall v. United States*, No. 06-7949 (Oct. 1, 2007).

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the First Circuit.

The petitioner here, and appellee below, is Michael K.C. Tom.

The respondent here, and appellant below, is the United States of America.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported in *United States v. Tom*, No. 07-1074, 2007 U.S. App. LEXIS 22994, at *1-22 (1st Cir. Oct. 1, 2007) (Pet. App. 2-19). The sentencing decision of the United States District Court for the District of Massachusetts is reprinted in the Petitioner's Appendix at 20-22.

JURISDICTION

The Court of Appeals entered its judgment on October 1, 2007. This Court has jurisdiction under 28 U.S.C. §1254.

STATUTES INVOLVED

This case involves provisions of the Sentencing Reform Act, 18 U.S.C. §§3553(a) and (c).

STATEMENT OF THE CASE

This case presents the issue of whether a sliding scale or proportionality requirement for appellate review of sentences outside the Sentencing Guidelines range is consistent with *United States v. Booker*, 543 U.S. 220 (2005) and *Rita v. United States*, 127 S. Ct. 2456 (2007). In *Tom*, the First Circuit applied a sliding scale test requiring that "the farther the judge's sentence departs from the Guidelines sentence...the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed." *United States v. Thurston*, 456 F.3d 211, 215 (1st Cir. 2006) (cited in *Tom*, 2007 U.S. App.

LEXIS 22994 at *9) (Pet. App. 8-9). As the basis for an appeals court to find, as it did in *Tom*, that the district court judge did not provide a "defensible overall result," *id.*, the sliding scale requirement effectively anchors all sentences to the Guidelines and renders sentences outside of the Guidelines presumptively unreasonable absent a compelling, proportionate justification, a result contrary to both *Rita* and *Booker*. The imposition of a sliding scale requirement on district court judges is therefore unconstitutional and unlawful.

A. Mr. Tom's Sentence

Michael Tom immigrated with his family to the United States from China in 1978. The Tom family arrived in the U.S. with nothing, but with hard work and education, Mr. Tom became an analyst at Citizens Bank ("Citizens"). In 2003, Mr. Tom left Citizens to form Global Time Capital Management ("Global") with two friends. Global managed a small hedge fund.

Mr. Tom is married and has a daughter, Michelle, who was four years old at the time of Mr. Tom's sentencing. Michelle has experienced significant developmental difficulties throughout her life. She has been diagnosed with neurotoxic brain damage due to excessive exposure to toxic heavy metals. As a result of the brain damage, Michelle struggles with cognitive and social development. She is on a strict regimen of intensive therapy and exercises to aid in her development. These therapies require constant

monitoring and supervision. Mr. Tom's wife, who is now the family's primary breadwinner, works full-time as an information technology employee at Children's Hospital. Mr. Tom's presence at home is vital to his daughter during this developmentally crucial time in her life.

At Citizens, Mr. Tom worked briefly with Shengnan Wang, a portfolio analyst in Citizens' Credit Portfolio Management Group ("CPMG"). In April 2004, Ms. Wang, based on information that CPMG members were traveling to perform due diligence in connection with a potential takeover, conducted her own investigation using airline itineraries, FDIC information, an online reverse telephone directory, and various other means to deduce that the targeted company was one of three banks: Charter One, KeyCorp, and National City Corporation. Ms. Wang told her husband about her findings and then, without any prompting, called Mr. Tom to share the information she had discovered.

Mr. Tom had been following Charter One and other regional banks at that time, but upon receiving the information from Ms. Wang, he unfortunately gave in to temptation and purchased securities in the three potential targets for a number of accounts, including the hedge fund that Global managed. The next day, Mr. Tom deduced from publicly available information that the likely target was Charter One and he increased his investments in Charter One securities. After Citizens announced that it was

acquiring Charter One and the price of Charter One stock increased significantly, Mr. Tom sold almost all his holdings in Charter One and realized a gain of roughly $800,000.

In light of an SEC investigation into trading in Charter One securities in advance of the announcement, Ms. Wang destroyed a document linking her to Mr. Tom and backdated a document signed by her husband and Mr. Tom. Additionally, Ms. Wang and Mr. Tom provided false testimony to the SEC. The U.S. Attorney's Office also launched an investigation which resulted in Ms. Wang and her husband pleading guilty to insider trading before a different district court judge. Mr. Tom pleaded guilty to five counts of insider trading in violation of 15 U.S.C. §78j(b) and §78ff(a) pursuant to a plea agreement. The SEC has forever barred Mr. Tom from working in the investment industry. Mr. Tom has also agreed to disgorge all of his profits from trading in the Charter One securities and will be required to pay a significant penalty to the SEC.

Ms. Wang benefited from the government's decision to extend an offer to cooperate and subsequently received a departure under U.S.S.G.§5K1.1 for her cooperation in the case against Mr. Tom. Ms. Wang was sentenced to twelve months of probation and 500 hours of community service, and the government did not appeal her sentence.

The government and Mr. Tom agreed that the Guidelines range for his offense was thirty-seven to forty-six months of confinement, the same as for Ms. Wang's offense. The government recommended a sentence at the low end of the range. Mr. Tom requested a downward departure on two grounds: (1) extraordinary family circumstances according to U.S.S.G. §5H1.6; and (2) the offense level substantially overstated the seriousness of the offense because part of Mr. Tom's trading activity was based on information he gathered via public records. The district court declined to depart on those grounds, finding that Mr. Tom's family situation did not qualify him for the first departure and the second departure was not available because the court could not determine with any certainty what part of the trades were based on public information rather than the inside information.

Based on the factors set forth in 18 U.S.C. §3553, however, the district court sentenced Mr. Tom to thirty-six months of probation, six months of which were to be served in a community confinement center. The court identified three factors it took into consideration when deciding the sentence. The first was the fact that Ms. Wang, whom the court viewed as more culpable, was sentenced to one year of probation while Mr. Tom faced more than three years of incarceration under the Guidelines. (Pet. App. 21). Taking into account Ms. Wang's cooperation, the court still found that the great disparity rendered the

Guidelines sentence inappropriate. (Pet. App. 21-22). Second, the court considered the sanctions imposed by the Securities and Exchange Commission on Mr. Tom to be significant punishment. (Pet. App. 21). Third, the court considered Mr. Tom's family situation and found that his presence was important, if not essential, to his daughter's development. (Pet. App. 22).

In sentencing Mr. Tom, the district court explicitly recognized the language of 18 U.S.C. §3553(a)(2)(A), (B), and stated, "I do think this is a serious offense, and I have to determine a sentence that reflects that seriousness and promote respect for the laws against insider trading." (Pet. App. 20-21). The district court considered the statutory factors in Mr. Tom's case and determined that the sentence imposed was "sufficient, but not greater than necessary," to achieve the purposes of sentencing enumerated in 18 U.S.C. §3553(a)(2). *See* 18 U.S.C. §3553(a).

B. Appellate Review

The government appealed Mr. Tom's sentence and the First Circuit reversed and remanded for resentencing. 2007 U.S. App. LEXIS 22994, at *22 (Pet. App. 19). The First Circuit found that the sentence was "unreasonable and that it did not give adequate consideration to the seriousness of the offense, the need for general deterrence for white-collar crimes, and the need for some imprisonment." *Id.* at *2 (Pet. App. 4). The court of appeals stated

that it was looking for "both 'a plausible explanation and a defensible overall result.'...This is not a case of inadequate explanation...but of whether the reasons stated do come to a defensible overall result." *Id.* at *9 (citing *United States v. Jimenez-Beltre*, 440 F.3d 514, 519 (1st Cir. 2006)) (Pet. App. 9). By this standard, the court of appeals found that the district court's sentence was "primarily based on a comparison with a co-defendant, and cannot be justified on that basis." *Id.* (Pet. App. 9).

In coming to this conclusion, the First Circuit in *Tom* relied on the same test it promulgated in *Thurston*: "[T]he farther the judge's sentence departs from the Guidelines sentence the more compelling the justification...the judge must offer." *Id.* (citing *United States v. Thurston (Thurston III)*, 456 F.3d 211, 215 (1st Cir. 2006) (Pet. App. 8-9). Relying on this standard, the First Circuit held that the district court's justifications for the below-Guidelines sentence were not sufficiently compelling. It stated that national uniformity in sentencing is a concern under 18 U.S.C. §3553(a)(6), and concluded that the Sentencing Guidelines promote such uniformity. *Id.* at *10-11 (Pet. App. 10). The First Circuit also found that Ms. Wang and Mr. Tom were not "similarly situated," *id.* at *13 (Pet. App. 12), and that the district court "did not give enough weight to this difference in circumstances" because Ms. Wang had cooperated and Mr. Tom did not. *Id.* at *14 (Pet. App. 12). In so finding, the First Circuit substituted its

judgment for that of the district court judge, who explicitly addressed the disparity issue:

> When I talked about disparity, I have in mind that Ms. Wang was entitled to some consideration by virtue of the fact that she cooperated. Mr. Tom didn't cooperate. He was not entitled to any consideration on that basis. But even so, I think there is a disparity, even if I take into account the cooperation, there's a disparity that makes the sentence recommended by the guideline sentence unjust in my view.

(Pet. App. 22). The First Circuit also declined to defer to the district court's findings with respect to relative culpability. The district court found that Ms. Wang, the corporate insider, was more culpable, stating:

> There is a sense in which the co-defendant, Wang, is the more culpable of the two of these defendants. There is also the fact that she cooperated and she got the benefit of that cooperation. I don't know how it came about, whether there was a race to the U.S. Attorney's Office and she won it, but it doesn't seem altogether fitting and proper that the person who is at the center of this criminal conduct should get a year's probation while Mr. Tom faces three years of incarceration.

(Pet. App. 21). The First Circuit, however, showed no deference to the district court on the issue of culpability, instead finding:

> The record does not uphold the court's assessment that Tom was "less culpable" than Wang. It is true that Wang was the insider who initiated the conspiracy. Yet the record is clear that Tom was Wang's senior and her mentor. He did not use his influence with Wang to stop the scheme. To the contrary, he exploited his mentor relationship and was actively involved in, had numerous conversations with Wang about, and tried to milk maximum illicit profit from their scheme.

2007 U.S. App. LEXIS 22994, at *13 (Pet. App. 12).

The district court also explicitly considered the need for deterrence and the role the significant SEC penalties would have, stating:

> The question that is most difficult for me is the question or the combined question about just punishment and adequate deterrence. I don't think there's a significant problem of specific deterrence for Mr. Tom. I think the penalties that have been and will be visited upon him by the SEC...are sufficient for specific deterrence. The question is what is just and appropriate as specific deterrence? And, similarly, to protect the public from crimes of not this defendant, but of people who

> would take advantage of inside information in the market, securities market.

(Pet. App. 21). The First Circuit rejected the district court's conclusion as to deterrence and also entirely discounted any effect which Mr. Tom might suffer from the significant SEC penalties. The First Circuit stated:

> [T]his lenient sentence undermined the strong congressional interest in deterring others from committing similar crimes. In *Taylor*, we found that a sentence without imprisonment for a white-collar defendant unreasonable in part because it did not satisfy this interest in deterrence. (citation omitted). Similarly, the availability of SEC sanctions does not justify this sentence....Because it is commonplace for a defendant to lose his ability to practice a profession...that career harm is not a valid ground for departure. (citations omitted) By definition, the fact that Tom has lost his license does not distinguish him from others convicted of insider trading.

2007 U.S. App. LEXIS 22994 at *15-17 (Pet. App. 14-15). The First Circuit decided that Mr. Tom's white-collar criminal conviction meant that his sentence almost automatically warranted imprisonment in order to satisfy the deterrence goal of §3553(a).

The First Circuit refused to accept any of the district court's reasons for the sentence it imposed. Instead, the First Circuit essentially presumed that

the sentence was unreasonable and placed the burden on the district court to make the "unreasonable sentence reasonable." *Id.* at *19 (Pet. App. 16). In the view of the First Circuit, only a sentence that included some term of imprisonment could have been "reasonable on the facts of this case." *Id.* (Pet. App. 16).

REASONS FOR GRANTING THE PETITION

This case presents the important question of whether a sliding scale requirement violates the "reasonableness" standard enunciated in *Booker* and *Rita*. This Court recently heard argument in the case of *Gall v. United States*, No. 06-7949 (Oct. 1, 2007), in which the Eighth Circuit applied an "extraordinary circumstances" test in reviewing non-Guidelines range sentencing decisions, and determined that the greater the deviation from the Guidelines, the more extraordinary the circumstances must be to justify the sentence. The First Circuit has adopted a similar sliding-scale test, requiring that a district court provide "compelling" justification in proportion to the sentence's deviation from the Guidelines range in order to be deemed reasonable.

The First Circuit's requirement that the district court provide a "compelling" justification in order to arrive at a "defensible overall result" eviscerates this Court's warning in *Rita* and *Booker* that appellate review should be deferential. The sliding scale requirement essentially permits appellate courts to

engage in *de novo* review of the facts justifying the sentence and the district judge's assessment of the case. This not only flies in the face of the "reasonableness" standard set forth in *Booker*, but it disregards the sentencing expertise and firsthand experience of the district court judges. The sliding scale test empowers appellate courts to engage in *de novo* review of the facts of a case under the guise of determining whether the district court provided a "compelling," proportional justification.

Additionally, as *Tom* and other recent First Circuit cases demonstrate, the court of appeals has determined that, in order for a sentence to be "sufficient," it must fall within the Guidelines range absent a "compelling" justification. This presumption of unreasonableness for all sentences falling outside of the Guidelines range is precisely what *Rita* prohibited. The Court should grant the petition and reverse the decision of the First Circuit with instructions to affirm the judgment of the district court.

I. THIS CASE RAISES THE IMPORTANT QUESTION OF WHETHER, IN REVIEWING A DISTRICT COURT'S SENTENCING DECISION, A COURT OF APPEALS CAN USE A SLIDING SCALE TEST THAT NEGATES THIS COURT'S HOLDINGS IN *BOOKER* AND *RITA*.

As this Court recognized by granting the writ of certiorari in *Gall*, there is a pressing need for this Court to clarify the extent of appellate court review

of district court sentencing decisions. The First Circuit has constructed a sliding scale test requiring "compelling" justification for sentences outside of the Guidelines range, which is contrary to this Court's holding in *Booker* that a sentence need only be reviewed for "reasonableness," and its holding in *Rita* that a sentence outside the Guidelines range is not presumptively unreasonable.

A. The Sliding Scale Requirement Violates the "Reasonableness" Standard Delineated in *Booker*

This case arises in a time when courts are testing the boundaries of this Court's decisions in *Booker* and *Rita*. The Court has been quite clear that appellate courts are required to review sentences for "reasonableness." *Booker*, 543 U.S. at 261-62. This Court in *Booker* specifically excised that provision of the Federal Sentencing Act, 18 U.S.C. §3742(e), which provided for *de novo* review of departures, and replaced it with "an abuse-of-discretion standard that we called 'reasonableness' review." *Rita*, 127 S.Ct. at 2470-71 (Stevens, J., concurring).

Post-*Booker*, the First Circuit has taken the stance that "reasonableness" review permits an appellate court to require a "compelling" justification that is proportional to the sentence's deviation from the Guidelines range. The First Circuit first used this approach in *Smith* by responding to the district judge's substantial deviation with a reference to the "compelling" justification approach utilized in *United*

States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005), and found that the district judge had not provided sufficient reasons to deviate as much as he did. The First Circuit again used this proportionality approach in *Thurston*: "Thus, we consider the reasonableness of a below-guideline sentence on a sliding scale: 'the farther the judge's sentence departs from the Guidelines sentence the more compelling the justification based on the factors in §3553(a) that the judge must offer.'" 456 F.3d at 215 (citing *Smith*, 445 F.3d at 4) (Pet. App. 46).

The First Circuit again employed the sliding scale approach in *Tom*, resulting in what is effectively *de novo* review according to an arbitrary, unspoken standard determined by the appellate court on a case by case basis, rather than the deferential reasonableness review mandated by *Booker*. In *Tom*, the First Circuit demonstrated its readiness to substitute its view of the facts of the case as part of its quest to determine if the district court judge had provided a sufficiently "compelling" justification.

The court of appeals showed no deference to the district court's assessment that Mr. Tom was less culpable than Ms. Wang. The facts upon which the district court relied were undisputed: Ms. Wang ferreted out the inside information on her own and then contacted Mr. Tom without any prompting on his part. Ms. Wang was the insider who actively sought out the information and provided it to Mr. Tom, and she did so because she and her husband

had invested $60,000 in the hedge fund Mr. Tom was managing. The First Circuit completely disregarded the district court's evaluation and its supportable factual findings, and instead conducted its own fact-finding mission, combing through the record looking for the facts it deemed supportive of its position, and then concluding:

> The record does not uphold the court's assessment that Tom was "less culpable" than Wang. It is true that Wang was the insider who initiated the conspiracy. Yet the record is clear that Tom was Wang's senior and her mentor. He did not use his influence with Wang to stop the scheme. To the contrary, he exploited his mentor relationship and was actively involved in, had numerous conversations with Wang about, and tried to milk maximum illicit profit from their scheme.

2007 U.S. App. LEXIS 22994, at *13 (Pet. App. 12). The court of appeals went on even further and held that "Tom was the dominant figure in the activity...Tom not only gave false testimony under oath to the SEC, but he convinced Wang to perjure herself so that the stories would be consistent. He then created a false document to replace a damning original document." *Id.* at *15 (Pet. App. 13). In making these findings, the First Circuit cited to portions of the presentence report which the district court had considered but as to which the parties reached no agreement: The presentence report

included the government's version of the offense conduct. Mr. Tom objected to many of those assertions, but the district court did not rule on the objections because the disputes did not affect the Guideline Sentencing Range.

Tom is merely the latest in a string of First Circuit cases using the sliding scale test and it reinforces the fact that this approach is flawed. Contrary to the deferential review indicated by *Booker* – a form of review that permits district court judges to engage in individualized sentencing – the sliding scale test effectively renders such sentencing decisions presumptively unreasonable, contrary to the holdings of *Booker* and *Rita*.

B. The Sliding Scale Requirement Imposes a Presumption of Unreasonableness on Sentences Outside the Guidelines Range

While *Rita* permits an appellate court to presume that a sentence within the Guidelines range is reasonable, this Court clearly stated that non-Guidelines sentences are not inherently suspect: "The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness." *Id.* at 2467. What this Court prohibited is, in effect, what the First Circuit has done.

The First Circuit in *Tom* has concocted its own set of directions for how to determine a sentence. Beginning with *Smith*, the First Circuit decided that

a sentencing judge should begin with a Guidelines calculation and then, after considering departures, "decide whether 'other factors' (beyond the Guidelines) warranted an ultimate sentence above or below the guideline range." 445 F.3d at 4 (citing *Jimenez-Beltre*, 440 F.3d at 519) (Pet. App. 28). The First Circuit found that the "within the range" sentence in *Jimenez-Beltre* was easy to affirm, but that, as in Smith's case, "[t]he farther the judge's sentence departs from the Guidelines sentence...the more compelling the justification...the judge must offer." *Id.* (quoting *Dean*, 414 F.3d at 729) (Pet. App. 29).

In *Tom*, the First Circuit again followed its own prescription, stating:

> The sentence at issue is substantially below the Guidelines scale of a minimum of thirty-seven months' imprisonment, and imposes no imprisonment. "The farther the judge's sentence departs from the guidelines sentence the more compelling the justification...the judge must offer." [citing *Thurston*]....This is not a case of inadequate explanation of the court's reasons for the sentence, but of whether the reasons stated do come to a defensible overall result.

2007 U.S. App. LEXIS 22994 at *8-9 (Pet. App. 8-9). This determination by the First Circuit is fundamentally at odds with *Rita* – a sentence outside of the guideline range cannot require more

justification than a sentence within the Guidelines range in order to be considered reasonable. Such a result reflects a presumption that a sentence within the Guidelines is reasonable, but a sentence outside the Guidelines is unreasonable.

This Court in *Rita* plainly stated, "the sentencing court does not enjoy the benefits of a legal presumption that the Guidelines sentence should apply." 127 S. Ct. at 2565. *Rita* clearly did not intend for the Guidelines to be the only basis by which a sentence can be deemed reasonable. *See id.* at 2466 ("A nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence. Still less does it *forbid* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone."). The First Circuit's imposition of the proportionality requirement for non-Guidelines sentences results in a presumption that a non-Guidelines sentence is unreasonable.

C. The Sliding Scale Requirement Eliminates the District Court's Discretion under the Sentencing Reform Act

The backbone of the Sentencing Reform Act is reliance on a sentencing judge's discretion in considering all factors relevant to each defendant and imposing a sentence that not only satisfies the purposes of the Act, but which is also "sufficient, but not greater than necessary, to comply with the

purposes [of §3553(a)(2)]." 18 U.S.C. §3553(a). Under §3553(c), the sentencing judge must give specific reasons for his decision regardless of whether the sentence is within, or outside of, the Guidelines range, but the judge possesses substantial latitude in deciding how the various pieces of the sentencing puzzle fit together in order to meet the goals of §3553. This Court in *Booker* endowed appellate courts with the power to review sentencing judges' decisions for "reasonableness," otherwise known as an "abuse-of-discretion standard." *Rita*, 127 S. Ct. at 2470-71. Additionally, this Court instructed appellate courts to "assess a district court's exercise of discretion 'with regard to §3553(a).'" *Id.* at 2472 (quoting *Booker*, 543 U.S. at 261).

The First Circuit's sliding scale requirement usurps the district court's role and instead places the appellate court in the position of the sentencing judge. In *Smith*, the First Circuit determined that the facts relied upon by the judge simply did not address §3553(a) factors such as protecting the public or affording adequate deterrence and therefore the sentence was "plainly unreasonable." 445 F.3d at 6-7 (Pet. App. 34-36). In *Thurston*, the court of appeals rejected the reasoning of two district judges and decided that the balance between the record, the §3553(a) factors, and the recommended Guideline sentence was best served by a minimum sentence of thirty-six months' imprisonment. 456 F.3d at 219-20 (Pet. App. 54-58). In *Tom*, the First Circuit agreed

with the Government that "some term of imprisonment is required for the sentence to be reasonable on the facts of this case." 2007 U.S. App. LEXIS 22994, at *19 (Pet. App. 16). Under the guise of reviewing for "reasonableness," but in actuality disregarding this Court's instruction that "reasonableness" is synonymous with "abuse-of-discretion," the First Circuit is conducting its own balancing of factors and purposes, and substituting its judgment for that of the district court, in order to arrive at what *it* considers a sentence that is "sufficient, but not greater than necessary."

The First Circuit has supplanted the "reasonableness" standard that this Court set down in *Booker* and *Rita*, and has instead created a standard of review that affords no deference to the sentencing judge's fact findings and assessment of the unique circumstances of each defendant. Appellate review according to the sliding scale requirement is a review for "reasonableness" in name only, and is contrary to *Booker* and *Rita*.

II. THE DISTRICT COURT'S SENTENCING DECISION WAS REASONABLE

With regard to Mr. Tom, the district court carefully considered the factors under §3553(a), made factual findings supported by the record, and imposed a sentence which was "sufficient, but not greater than necessary, to comply" with the purposes of the Sentencing Reform Act. For the reasons already discussed, the First Circuit should have

shown deference to the district court's decision and reviewed only for abuse of discretion, and not employed the sliding scale to substitute its judgment for that of the district court.

A. The District Court Imposed a Sentence that Complies with §3553

In sentencing Mr. Tom, the district court considered the specific facts of Mr. Tom's situation to determine a sentence that complied with 18 U.S.C. §3553(a). The district court judge did not take his duties lightly and provided thoughtful reasons for his sentencing decision, a sentence which addressed the unique circumstances of the defendant and his case.

The judge first determined that Mr. Tom did not qualify for a departure under the Sentencing Guidelines. He then looked at the factors to be considered under §3553(a). The judge found that there was not a significant problem of specific deterrence under §3553(a)(2)(B) and (C) because of the penalties and other sanctions Mr. Tom would receive from the SEC. (Pet. App. 21). The district court remarked, "I think the penalties that have been and will be visited upon him by the SEC, including exclusion from what he calls his lifetime work, are sufficient for specific deterrence." (Pet. App. 21).

Additionally, the district court judge was troubled with the disparity between the sentence Ms. Wang received and what Mr. Tom was facing, a factor which the judge was entitled to consider under §3553(a)(6), which addresses "the need to avoid

unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The judge determined that Ms. Wang was "the more culpable of the two of these defendants," and despite the fact that Ms. Wang cooperated and Mr. Tom did not, "it doesn't seem altogether fitting and proper that the person who is at the center of this criminal conduct should get a year's probation while Mr. Tom faces three years of incarceration." (Pet. App. 21).

The district court judge also considered Mr. Tom's family situation, and more specifically, the impact of his absence from the household on his developmentally disabled daughter. (Pet. App. 22). This plainly is a factor that should be assessed under §3553(a)(1), which allows the sentencing judge to consider a defendant's "history and characteristics."

Overall, the judge considered the "seriousness of the offense" under §3553(a)(2)(A) and recognized that he had "to determine a sentence that reflects that seriousness and promote respect for the laws against insider trading." (Pet. App. 20-21). The judge explained that the difficulty with Mr. Tom's sentence was balancing the need for "just punishment" under §3553(a)(2)(A) with the requirements of "adequate deterrence" under §3553(a)(2)(B) and protecting "the public from further crimes of the defendant" under §3553(a)(2)(C). (Pet. App. at 21).

In the end, the district court judge imposed a sentence which it considered a "reasonable sentence in this case in light of all the facts I've mentioned, and particularly the taking into account what has happened to the other defendants who were involved in this same activity." (Pet. App. 22). Only after careful deliberation regarding all of the §3553(a) factors did the district court judge determine that the sentence was "sufficient, but not greater than necessary to comply with the purposes set forth" in §3553(a)(2).

The First Circuit has made it clear that it would not sentence Mr. Tom in the same manner, but *Booker* does not permit the court to reverse the sentence where, as here, the district court considered the statutory factors, made factual findings supported by the record, and tailored a sentence to the unique circumstances of the defendant and his case. Determining the weight accorded to each factor, and calibrating the factors in a particular case are tasks which *Booker* assigns to the district court. The First Circuit has strayed from its duty to review for abuse of discretion, or "reasonableness," and has instead taken the sliding scale approach as a license to scour the record for facts supporting its view of the case, and to substitute its assessment of the sentencing factors for those of the district judge.

The district court in *Tom* found facts supported by the record, assessed all of the relevant sentencing factors enumerated in §3553(a), and imposed a

sentence that was "sufficient, but not greater than necessary," to comply with the purposes of sentencing. Although that sentence was below the Guideline Sentencing Range, it was a "reasonable" sentence within the meaning of *Booker*, and that sentence should be reinstated.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari, vacate the decision of the U.S. Court of Appeals for the First Circuit, and reinstate the district court's sentence.

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 07-1074

UNITED STATES OF AMERICA,
Appellant,

v.

MICHAEL K.C. TOM,
Defendant, Appellee.

JUDGMENT

Entered: October 1, 2007

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The sentence imposed by the district court is reversed, and the matter is remanded to the district court for resentencing in accord with the opinion issued this day.

By the Court:
s/Richard Cushing Donovan
Richard Cushing Donovan, Clerk

[Certified copies to Hon. Reginald C. Lindsay and Ms. Sarah Thornton, Clerk, United States District Court for the District of Massachusetts. Copies to Mr. Mitchell, Ms. Chaitowitz, & Mr. Pearlstein.]

2007 U.S. App. LEXIS 22994, *

UNITED STATES OF AMERICA, Appellant, v. MICHAEL K.C. TOM, Defendant, Appellee.

No. 07-1074

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

2007 U.S. App. LEXIS 22994

October 1, 2007, Decided

SUBSEQUENT HISTORY: As Amended October 24, 2007

PRIOR HISTORY: [*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Reginald C. Lindsay, U.S. District Judge.

COUNSEL: Jonathan F. Mitchell, Assistant United States Attorney, with whom Michael J. Sullivan, United States Attorney, and Cynthia A. Young, Assistant United States Attorney, were on brief, for appellant. Mark W. Pearlstein, with whom Benjamin A. Goldberger and McDermott Will & Emery LLP, were on brief, for appellee.

JUDGES: Before Lynch and Lipez, Circuit Judges, and Barbadoro, n* District Judge.

n* Of the District of New Hampshire, sitting by designation.

OPINION BY: LYNCH

OPINION

LYNCH , Circuit Judge. The government appeals as unreasonably lenient a sentence of thirty-six months' probation (including six months of community confinement) imposed on a white-collar criminal, Michael Tom. Tom, a securities professional, illegally made almost $ 800,000 in insider trading profits and then obstructed justice by lying under oath to the Securities and Exchange Commission, encouraging another witness to lie, and creating a false document.

The low end of the Sentencing Guidelines range for Tom, including a two-level increase for obstruction of justice, was thirty-seven months' imprisonment, and the prosecution [*2] agreed to make that recommendation as part of a plea agreement. After accepting Tom's guilty plea, the court declined to sentence within the Guidelines range or to imprison Tom, and stated three reasons for its sentence. The court primarily rested on a disparity rationale: that Shengnan Wang, who as a cooperating co-defendant received a U.S.S.G. § 5K1.1 departure, was the insider tipper and gained $ 9,761, and had been sentenced by a different judge to twelve months' probation (and 500 hours community service). The court stated that Tom was less culpable than Wang, and that made any Guidelines sentence for Tom unjust. The court also articulated a concern that Tom was subject to sanctions by the SEC, and a prison sentence would over-punish him. Finally, while the court had concluded that family

circumstances would not justify a downward departure, the court noted that Tom's family problem -- a daughter's illness -- factored into the mix.

We agree with the government that the sentence is unreasonable and that it did not give adequate consideration to the seriousness of the offense, the need for general deterrence for white-collar crimes, and the need for some imprisonment. We reverse [*3] and remand for resentencing.

I.

On February 15, 2006, Michael Tom waived indictment and pleaded guilty to five counts of insider trading in violation of 15 U.S.C. § 78j(b) and § 78ff(a). The insider trading arose out of a call on April 29, 2004 that Tom received from Shengnan Wang, an employee of Citizens Bank. Tom and Wang had worked together at Citizens during the end of 2003, where he had helped hire and train her, and they kept in touch when Tom left Citizens to start a hedge fund, Global Time Capital Management. In February 2004, Wang and her husband invested $60,000 in Tom's fund.

Wang's department performed due diligence on banks which Citizens sought to acquire. The day before Wang called Tom, her supervisor informed her that other members of her department were traveling to conduct due diligence at an acquisition target; while she deliberately was not provided the destination, she learned through her own investigations that the due diligence was taking place in Cleveland, Ohio, and that three banks were based there: KeyCorp, National City Corporation, and Charter One.

In Wang's call to Tom the next morning, she told him that the Citizens team was analyzing an acquisition target [*4] in Cleveland, Ohio. Ten minutes after the call, Tom sent an e-mail to his brother recommending that he purchase securities in the three banks. In the next two-and-a-half hours, Tom made eighteen purchases of over $25,000 of stocks and options in each of the three likely target banks for the hedge fund, for himself, and for family members whose accounts he controlled. Over the next several days, as sales volume in Charter One increased, Tom sold off his securities in the other two banks and acquired a larger position in Charter One. By the end of the week, he had made 52 trades, acquiring 952 Charter One call options and 2,100 shares of Charter One common stock. Neither Wang nor her husband purchased any securities.

After the market closed on May 4, 2004, Citizens announced it was acquiring Charter One. The next day, Tom sold virtually all of his Charter One holdings and realized a gain of $743,505.37. Including his brother's gain of $39,089, the total gain reasonably attributable to Tom was $782,594.37.

After an article the following week on the Forbes website mentioned Tom's unusual trading activity, the SEC initiated an investigation. Tom attempted to obstruct this investigation [*5] in numerous ways. First, he told Wang's husband to sign a new backdated investment contract in an attempt to mislead the government as to any link between Wang and Tom. This backdated document was provided to the SEC pursuant to a subpoena. Second, Tom convinced Wang to cover up the real purpose of

her phone call, telling her to tell the SEC that she had called not to give information about the merger, but to seek his guidance in using one of Citizens' financial databases. Lastly, Tom provided false testimony under oath to the SEC, giving information that was directly contrary to the available evidence regarding his communications with Wang.

Wang and her husband were charged with insider trading separately from Tom. They both pleaded guilty before a different district court judge. Because Wang cooperated in the case against Tom, she received a U.S.S.G. § 5K1.1 departure for providing substantial assistance to the government. The judge sentenced them both to one year of probation.[1]

Tom signed a plea agreement with the government in which both parties agreed that the proper Guidelines range was [*6] thirty-seven to forty-six months in prison, which included a two-level increase for obstruction of justice. He waived his right to appeal the sentence or seek any departure, except on two grounds: (1) because of his extraordinary family circumstances and (2) because the loss overstated the seriousness of his offense.

The government took the position that thirty-seven months' imprisonment, the low end of the Guidelines, was warranted. Tom sought a departure from the Guidelines range on both his reserved grounds, requesting thirty-six months' probation, including twelve months' home detention. Based on a

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[1] The record does not indicate the government's recommended sentence for Wang and her husband.

report from a holistic medical practitioner who diagnosed his daughter as suffering from heavy metal poisoning, Tom argued that he was her necessary caregiver. He then claimed that the loss was overstated because at a certain point after he began trading Charter One securities, he relied on publicly available information. In addition to the grounds for departure, Tom also argued to the court that he had already agreed with the SEC never to work in the investment industry again, and that he still was potentially liable to the SEC in an outstanding civil action. Lastly, Tom mentioned the [*7] need to avoid a sentencing disparity between him and Wang, arguing that as the insider, she was the more culpable of the wrongdoers.

The district court appropriately calculated the Guidelines range of thirty-seven to forty-six months in accord with the plea agreement and declined to grant Tom's request for a departure under the Guidelines. The government provided a report from a board-certified toxicologist stating that Tom's daughter likely did not suffer from metal poisoning, and that the treatment Tom suggested could in fact put her at greater risk. The report went on to say that even if the daughter did require that treatment, Tom's participation was unnecessary. The court then concluded that Tom's presence was not "essential" to his daughter, and that his family circumstances did not rise to the level that would result in a departure. In addition, the court decided that it was impossible to disentangle Tom's insider trading from his trading based on public information.

In rendering Tom's sentence, however, the court imposed a term of thirty-six months' probation, six of which were to be served in a community confinement center. The court based the sentence on three reasons. First, [*8] it said it wanted to avoid sentencing disparity between Tom and Wang, whom the court viewed as more culpable. While the court recognized that it had no basis from the record to assess the reasons for Wang's sentence, and that Wang had cooperated while Tom had not, it stated that "it doesn't seem altogether fitting and proper that the person who is at the center of this criminal conduct should get a year's probation while Mr. Tom faces three years of incarceration. That disparity alone suggests to me that a Guideline[s] sentence is not the appropriate sentence." Second, the court recognized that Tom was still subject to punishment by the SEC. Third, the court recognized that while Tom's "family problem" did not qualify for a departure, his presence at home was "important to the development of his daughter." The government appealed the sentence as unreasonably lenient.

II.

This court is required on appeal to review sentences for reasonableness. *United States v. Booker*, 543 U.S. 220, 261, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005); *United States v. Jimenez-Beltre*, 440 F.3d 514, 517 (1st Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 928, 166 L. Ed. 2d 715 (2007). The sentence at issue is substantially below the Guidelines scale of a minimum [*9] of thirty-seven months' imprisonment, and imposes no imprisonment. "[T]he farther the judge's sentence

departs from the guidelines sentence the more compelling the justification . . . the judge must offer." *United States v. Thurston (Thurston III)*, 456 F.3d 211, 215 (1st Cir. 2006) (quoting *United States v. Smith*, 445 F.3d 1, 4 (1st Cir. 2006)). We look for both "a plausible explanation and a defensible overall result." *Jimenez-Beltre*, 440 F.3d at 519. This is not a case of inadequate explanation of the court's reasons for the sentence, but of whether the reasons stated do come to a defensible overall result.[2] The sentence essentially substituted for a term of over three years' imprisonment a term of probation. Further, the only confinement imposed was community confinement, and then only for a six-month period.

The low sentence was primarily based on a comparison with a co-defendant, and cannot be justified on that basis. Our circuit law firmly holds that the concern with disparity among defendants is primarily a national concern, and not a concern [*10] about defendants in a particular case or court. *Thurston III*, 456 F.3d at 216; *United States v. Mueffelman*, 470 F.3d 33, 40 (1st Cir. 2006).

Post Booker, there remains a strong interest in national uniformity among defendants who commit the same crimes and are similarly situated. We have not held that consideration of co-defendant disparity before the same judge is impermissible, but have often rejected arguments relying on co-defendant disparity as a basis to give lenient sentences well

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[2] We do not address the hypothetical question of whether any deviation was unreasonable, but only of whether this sentence was unreasonable.

below the Guidelines range. *See Thurston III*, 456 F.3d at 215 (vacating a sentence that relied on co-defendant disparity); *United States v. Navedo-Concepcion*, 450 F.3d 54, 60 (1st Cir. 2006) (concluding that district court was reasonable in sentencing a defendant to a longer sentence than co-defendants); *United States v. Saez*, 444 F.3d 15, 18 (1st Cir. 2006) (same), *cert. denied*, 127 S. Ct. 224, 166 L. Ed. 2d 178 (2006); *United States v. Gomez-Pabon*, 911 F.2d 847, 862 (1st Cir. 1990). We have done so because, inter alia, a focus on co-defendant disparity has a tendency to thwart the goal of national uniformity. *See, e.g., Thurston III*, 456 F.3d at 215.

The Sentencing Guidelines and decisions by the Sentencing Commission, [*11] while not exclusive, are the vehicles for "promoting [national] uniformity and fairness." *Jimenez-Beltre*, 440 F.3d at 518. This is in part because the Guidelines (a) represent the only integration of the multiple statutory factors set forth in 18 U.S.C. § 3553(a); (b) are a reflection of data on past sentencing practices; and (c) bear the imprimatur of the Sentencing Commission, which is the expert agency charged with developing the Guidelines. *Id.*; *see also Rita v. United States*, 127 S. Ct. 2456, 2463-65, 168 L. Ed. 2d 203 (2007); *United States v. D'Amico*, 496 F.3d 95, 2007 WL 2253494, at *8 (1st Cir. 2007); *Smith*, 445 F.3d at 4.

Here, it is true, as the defendant argues, that there is no statute requiring a mandatory minimum sentence for this crime. It would be wrong to conclude, as Tom claims, that congressional intent is not at issue in substantial deviations because the

Guidelines are not a statute. In Thurston III, we recognized that the Commission, in revising the Guidelines, was responding to congressional concern over the leniency of punishments for white-collar offenses. 456 F.3d at 218. We have also recognized that the statute, 18 U.S.C. § 3553(a), expressly refers to "the need to [*12] avoid unwarranted sentence disparities" across the nation. *Smith*, 445 F.3d at 3-4 (quoting 18 U.S.C. § 3553(a)(6)) (internal quotation mark omitted). Further, the Supreme Court in *Rita* has reaffirmed that the Guidelines largely reflect what Congress intended. *See Rita*, 127 S. Ct. at 2463-65 (2007) (noting that "the Guidelines, insofar as practicable, reflect...sentences that might achieve § 3553(a)'s objectives").

Thus, under circuit law, while consideration of disparity among sentences imposed by the same judge on similarly situated defendants may play some role in the analysis, *Mueffelman*, 470 F.3d at 41, even that disparity[3] does not necessarily justify a substantial deviation from the Guidelines absent compelling justification. We have also been clear that disparities with sentences imposed by other judges on co-defendants can play an even lesser role in the analysis for several reasons. One is that the other

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[3] Indeed, the sentence imposed created a disparity contrary to and not consistent with "the need to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6); *see also United States v. Taylor*, F.3d, 499 F.3d 94, 2007 U.S. App. LEXIS 19736, 2007 WL 2349415, at *8-9 (1st Cir. Aug. 17, 2007).

judge's reasons for the sentence are not fully known. *Saez*, 444 F.3d at 19; see also *Id.* ("But with different judges sentencing two defendants quite differently, there is no more reason to think that the first one was right than the second."). Another is that this would [*13] lead "to endless rummaging by lawyers through sentences in other cases" to find specific examples, and create a model of analysis which is "about the weakest sort of proof of national practice that can be imagined." *Id.* The court here erred in the significance it gave to the sentence imposed on a co-defendant by a different judge.

Further, the two defendants were not similarly situated. The record does not uphold the court's assessment that Tom was "less culpable" than Wang. It is true that Wang was the insider who initiated the conspiracy. Yet the record is clear that Tom was Wang's senior and her mentor. He did not use his influence with Wang to stop the scheme. To the contrary, he exploited his mentor relationship and was actively involved in, had numerous conversations with Wang about, and tried to milk maximum illicit profit from their scheme. He [*14] made over fifty trades, tipped his own brother, and reaped together with his brother close to $ 800,000 in profits.

While the court did recognize that Wang had cooperated and Tom had not, it did not give enough weight to this difference in circumstances. "Although a district court may consider disparities among co-defendants in determining a sentence, [a defendant's] sentence [is not] unreasonable simply because his co-defendant[] agreed to help the

government in exchange for [a] reduced sentence[]." *United States v. Vazquez-Rivera*, 470 F.3d 443, 449 (1st Cir. 2006); *see also Saez*, 444 F.3d at 18 (justifying sentence disparity by describing co-defendant's cooperation); *United States v. Mateo-Espejo*, 426 F.3d 508, 514 (1st Cir. 2005) ("[D]ifferences between the appellant's belated and grudging cooperation and [co-defendant's] prompt and full cooperation sensibly account for the differing sentences.").[4]

Further, Tom was the dominant figure in the activity amounting to obstruction of justice. Tom not only gave false testimony under oath to the SEC, but he convinced Wang to perjure herself so that the stories would be consistent. He then created a false document to replace a damning original document.

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[4] Other circuits have also taken this view. *See, e.g., United States v. Cain*, 487 F.3d 1108, 1114-15 (8th Cir. 2007) (upholding as reasonable a sentence twice as long as that received by an allegedly more culpable co-defendant because co-defendant's cooperation and testimony rendered him [*15] "not similarly situated"); *United States v. Ramirez*, 221 Fed. Appx. 883, 887-88 (11th Cir. 2007) (upholding as reasonable a sixteen-year sentence for a defendant without a criminal history, when the defendant with the "central role" received only a seven-year sentence but had assisted the government's investigation); *United States v. Boscarino*, 437 F.3d 634, 638 (7th Cir. 2006), cert. denied, 127 S. Ct. 3041, 168 L. Ed. 2d 755 (2007) (upholding as reasonable a sentence longer than that imposed on a co-defendant who cooperated, and noting that a "sentencing difference is not a forbidden 'disparity' if it is justified by legitimate considerations, such as rewards for cooperation").

As a separate ground, we also agree with the government that this lenient sentence undermined the strong congressional interest in deterring others from committing similar crimes. In particular, "deterrence of white-collar crime [is] [*16] of central concern to Congress." *Mueffelman*, 470 F.3d at 40. In *Taylor*, we found a sentence without imprisonment for a white-collar defendant unreasonable in part because it did not satisfy this interest in deterrence.[5] 2007 U.S. App. LEXIS 19736, 2007 WL 2349415, at *8.

Similarly, the availability of SEC sanctions does not justify this sentence.[6] The fact that the SEC may

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[5] There, we noted that Congress has explained: The placing on probation of [a white-collar criminal] may be perfectly appropriate in cases in which, under all the circumstances, only the rehabilitative needs of the offender are pertinent; such a sentence may be grossly inappropriate, however, in cases in which the circumstances mandate the sentence's carrying substantial deterrent or punitive impact. *Taylor*, 2007 U.S. App. LEXIS 19736, 2007 WL 2349415, at *8 (quoting S. Rep. No. 98-225, at 91-92 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3274-75).

[6] Tom volunteered the settlement with the SEC that barred him from associating with investment advisors. In addition, it is not clear that a heavier sentence will lead to increased overall punishment. [*18] as the SEC has agreed to hold its civil case in abeyance until the conclusion of the criminal matter. Indeed, defendant's counsel informed the district court that "the SEC in this matter would like to see what [the court] does, and based on what [the court] does, do what it deems appropriate anything additional [sic]."

order disgorgement and monetary penalties[7] is no substitute for the fact that Congress made this offense a crime, subject to imprisonment. Our case law has already rejected this argument. In *Jimenez-Beltre*, we found that the presence of other sanctions was not a persuasive ground for a reduced sentence. 440 F.3d at 520. All [*17] investment advisors who engage in insider trading are subjected to such civil punishment, so "[t]he guideline sentencing range was likely predicated on this understanding." *Id.*; see also *Koon v. United States*, 518 U.S. 81, 110-11, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996). Because it is commonplace for a defendant to lose his ability to practice a profession (in this case, Tom's ability to be an investment advisor or be associated with an advisor), that career harm is not a valid ground for departure. *United States v. Hoffer*, 129 F.3d 1196, 1203-04 (11th Cir. 1997) (finding loss of medical license an invalid basis for departure); *cf. Koon*, 518 U.S. at 110 (finding an abuse of discretion when sentencing judge based downward departure on potential for defendants' "career loss"). By definition, the fact that Tom has lost his license does not distinguish him from others convicted of insider trading. See 15 U.S.C. § 80b-3(f) (allowing the SEC to bar those convicted of insider trading from association with investment advisors).

Further, his argument would lead to problematic class distinctions: white-collar criminals would be

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[7] The pre-sentence report stated that Tom had a net worth of more than a million dollars. The court adopted the report without change.

able to avoid imprisonment while non-professionals would be imprisoned because the latter have neither a license to lose nor substantial sums of money to pay civil sanctions. Sentences for white-collar criminals should have the following effects: "deterrence of white-collar crime..., the minimization of discrepancies between white- and blue-collar offenses, and limits on the ability of those with money or earning potential to buy their way out of jail." *Mueffelman*, 470 F.3d at 40. *See also Thurston III*, 456 F.3d at 218. The rationale here cannot, consistent with the interest in national uniformity in sentencing, reasonably be the basis [*19] for a below-Guidelines sentence.

This leaves the district court's third stated reason, the "family problem" rationale for departure. The court correctly recognized this rationale could not, on its own, justify a departure. The other two grounds could not justify the sentence given. Throwing this rationale into the mix does not make an unreasonable sentence reasonable.

We believe the government is correct that some term of imprisonment is required for the sentence to be reasonable on the facts of this case. Such a result is consistent with our precedent. In Taylor, the court found unreasonable a sentence of probation and time in a halfway house for a white-collar defendant who had also obstructed justice. 2007 U.S. App. LEXIS 19736, 2007 WL 2349415, at *1; *see also Thurston III*, 456 F.3d at 220 (finding, when a district court judge sentenced a white-collar defendant to three months' imprisonment although the Guidelines recommendation was sixty months, that any

sentence below thirty-six months of imprisonment would be unreasonable); *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006) (holding that a seven-day sentence of imprisonment for a white-collar defendant was unreasonable).

Tom argues his sentence [*20] includes confinement: that the sentence of six months' community confinement is the equivalent of a prison sentence. We reject the argument. Most fundamentally, community confinement for whatever period is not the same as imprisonment for thirty-six months. *See United States v. Rattoballi*, 452 F.3d 127, 135, 137 (2d Cir. 2006) (finding unreasonable a sentence that substituted one year of home confinement and five years' probation for a Guidelines range between twenty-seven and thirty-three months' imprisonment); *United States v. Elkins*, 176 F.3d 1016, 1020 (7th Cir. 1999) ("Community confinement...do[es] not [itself] constitute 'imprisonment.'"). [Further, even if it were, a six-month sentence is only 16% of a thirty-six-month sentence.]

Tom points to U.S.S.G. § 5C1.1(e)(2), which establishes a schedule under which one day of community confinement may be substituted for one day of imprisonment for purposes of conforming with the Guidelines. His very argument refutes itself: this substitution holds true only for Guideline ranges that fall within Zones B and C of the Sentencing Table. Tom's uncontested Guidelines range was thirty-seven to forty-six months, which falls solidly within [*21] Zone D, and for which the Guidelines provide no substitute punishment for imprisonment.

U.S.S.G. § 5C1.1(f); *see also United States v. Mercado*, 412 F.3d 243, 253 n.4 (1st Cir. 2005) (noting that community confinement cannot substitute for imprisonment for Zone D sentences under the Guidelines); *United States v. Martin*, 363 F.3d 25, 40 n.25 (1st Cir. 2004) ("[B]ecause Zone D does not allow for [community confinement], the conversion ratio...is inapplicable to this case by the terms of the Guidelines themselves."). Even for sentences within Zone B or Zone C, some minimum term of imprisonment is recognized under the Guidelines: for Zone B sentences when imprisonment is ordered, there must be at least one month of imprisonment, and for Zone C sentences at least one-half of the minimum term must be served in prison. U.S.S.G. § 5C1.1(c), (d); *see also United States v. Cintron-Fernandez*, 356 F.3d 340, 347-48 (1st Cir. 2004).

Further, we have recognized that community confinement is "considered as [one of the] 'Substitute Punishments' for imprisonment, not [a] merely different form[] of imprisonment itself." *Cintron-Fernandez*, 356 F.3d at 347; *see also United States v. Serafini*, 233 F.3d 758, 777 (3d Cir. 2000) (stating [*22] community confinement cannot constitute imprisonment for purposes of fulfilling the requirement that one-half of a split sentence be satisfied by imprisonment under section 5C1.1); *United States v. Adler*, 52 F.3d 20, 21 (2d Cir. 1995) ("'Imprisonment' and 'community confinement' are not synonyms.").

We reverse the sentence and remand for resentencing in accord with this opinion.

United States District Court
District of Massachusetts
United States of America v. Michael K.C. Tom
Criminal Action No. 05-10361-RCL
November 28, 2006
Boston, Massachusetts

Excerpt of Transcript of Sentencing of
Michael K.C. Tom
Before the Honorable Reginald C. Lindsay
United States District Court
John J. Moakley U.S. Courthouse
1 Courthouse Way
Boston, MA 02210

THE COURT: Well, this is not the easiest case to decide.

Mr. Tom has disgorged a considerable amount of money. That's not really a factor that I consider in determining the sentence, because he's disgorged his money he shouldn't have had in the first place.

He does, however, face significant penalties as yet unknown from the SEC. But I do keep that in mind as I decide this sentence.

I have in mind the difficulties – the problem with his daughter, though I do not believe these problems would result in a departure under the guidelines.

Despite what might have appeared from my conversation with Mr. Mitchell, I do think this is a serious offense, and I have to determine a sentence that reflects that seriousness and promote respect for the laws against insider trading.

The question that is most difficult for me is the question or the combined question about just punishment and adequate deterrence. I don't think there's a significant problem of specific deterrence for Mr. Tom. I think the penalties that have been and will be visited upon him by the SEC, including exclusion from what he calls his lifetime work, are sufficient for specific deterrence.

The question is what is just and appropriate as specific deterrence. And, similarly, to protect the public from crimes of not this defendant but of people who would take advantage of inside information in the market, securities market.

In deciding that question I have to take into account what has happened to the other defendants in this case. There is a sense in which the co-defendant, Wang, is the more culpable of the two of these defendants. There is also the fact that she cooperated and she got the benefit of that cooperation. I don't know how it came about, whether there was a race to the U.S. Attorney's Office and she won it, but I doesn't seem altogether fitting and proper that the person who is at the center of this criminal conduct should get a year's probation while Mr. Tom faces three years of incarceration. That disparity alone suggests to me that a guideline sentence is not the appropriate sentence. I shouldn't say alone. I take into account the fact that there has already been significant punishment to Mr. Tom and will be significant punishment, administrative punishment, to him; and I also take into account that there – while he does not qualify for an extraordinary family circumstance

under the guidelines, there is a family problem and there is evidence that his presence in the home if not essential, it certainly is important to the development of his daughter.

I have been considering for the last few minutes what kind of sentence achieves what I think is the reasonable sentence in this case in light of all the facts I've mentioned, and particularly the taking into account what has happened to the other defendants who were involved in this same activity, and I've come up with the following sentence, which I am now ready to impose.

...

THE COURT: Before I forget, there is something I should have said when I was discussing this sentence that I didn't say.

When I talked about disparity, I have in mind that Ms. Wang was entitled to some consideration by virtue of the fact that she cooperated. Mr. Tom didn't cooperate. He was not entitled to any consideration on that basis. But even so, I think there is a disparity, even if I take into account the cooperation, there's a disparity that makes the sentence recommended by the guideline sentence unjust in my view.

445 F.3d 1, *; 2006 U.S. App. LEXIS 8421, **

UNITED STATES OF AMERICA, Appellant, v. COREY SMITH, Defendant, Appellee.

No. 05-1725

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

445 F.3d 1; 2006 U.S. App. LEXIS 8421

April 7, 2006, Decided

SUBSEQUENT HISTORY: As Amended, April 12, 2006.

PRIOR HISTORY: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Morris E. Lasker, n* Senior U.S. District Judge.

n* Of the Southern District of New York, sitting by designation.

COUNSEL: Patrick M. Hamilton, Assistant United States Attorney, with whom Michael J. Sullivan, United States Attorney, was on brief for appellant. Jonathan Shapiro with whom Stern, Shapiro, Weissberg & Garin, LLP was on brief for appellee.

JUDGES: Before Boudin, Chief Judge, Stahl, Senior Circuit Judge, and Howard, Circuit Judge.

OPINION BY: BOUDIN

OPINION

[*2] BOUDIN, Chief Judge. Corey Smith pled guilty to six counts of crack distribution and one count of conspiring to sell crack. Applying the sentencing guidelines, the district court calculated Smith's sentencing range to be 100-125 months of imprisonment, but then sentenced Smith to 46 months of imprisonment (followed by six years of supervised release). The government now appeals, arguing that Smith's sentence is unreasonably low.

In October and November of 2003, Smith--who was twenty-one years old at the time--facilitated four sales and made three direct sales of crack cocaine to Adolfo Brito, an undercover police officer. All of the transactions, [**2] save perhaps one, took place within 1,000 feet of either the George A. Lewis Middle School or the Little Scobie Playground. Smith was arrested on April 15, 2004, and eventually pled guilty to six counts of crack distribution and one count of conspiring to sell crack. 21 U.S.C. 841(a) (2000).

Soon after his arrest, Smith was released to an in-patient drug treatment program at Spectrum House and successfully completed the initial treatment program. In January 2005, after his guilty plea, he was transferred to a "sober house" run by the South Middlesex Opportunity Council. After a series of violations of the sober house's rules--including staying out without authorization--Smith's release was revoked by a magistrate judge on February 8, 2005, and he was thereafter detained until April 19, 2005, when his sentence was imposed.

The pre-sentence report calculated Smith's total offense level as 25, based on the quantity of crack (14.25 grams), the proximity of his offenses to a school and playground, and Smith's acceptance of responsibility. Because of prior convictions for various offenses, including the possession of marijuana with the intent to distribute, [**3] Smith had a criminal history category of V (based on eleven criminal history points).[1]

The probation officer found no basis for a downward departure under the guidelines. This meant that Smith's guideline sentencing range was 100 to 125 months. However, the sentencing occurred after *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), so the district court was not restricted to a guideline sentence. It appears that the probation [*3] officer recommended a below-guideline sentence of sixty months based on considerations such as Smith's limited role in the offenses, his rehabilitation from his drug habit, [**4] and the allegedly minor nature of his prior offenses.

After hearing argument from the government and defense counsel, and after an allocution by the defendant, the district judge (over the government's objection) sentenced Smith to 46 months in prison

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[1] Smith was convicted of these crimes embracing six separate incidents spanning the period May 16, 2000, to December 3, 2002. He served time in prison after violating the conditions of his probation stemming from his drug possession conviction, and it was soon after his release from that period of incarceration that he was arrested for the crime in question here.

followed by six years of supervised release, and recommended drug treatment for Smith while in prison. In explaining the sentence, the district judge addressed Smith as follows: I think you're a man who has done wrong things, gotten in trouble, find yourself in a fix, but you're young and you may turn around and I'd like to see you turn around rather than get crushed....

Against you is the nature of the offense that you committed, an aggravated selling of controlled substance regularly in a location close to a school, and although I don't suppose you sat and thought about whether it's close to a school or not, I'm sure you knew there were a lot of little kids in that area, and that's a hell of a place to be selling cocaine, and the law makes it more of an offense, but in your favor is the fact that you were involved in the offense for a limited period of time and do not appear to have been a leader. You appear to [**5] have committed the crime to support your drug habit.

While on pretrial release you did participate in drug abuse treatment and, for the most part, you received positive reports, although I guess you had a couple of slips, didn't you? And during pretrial release, you did obtain employment..

Bearing all these things in mind and the requirements of the statute that the sentence imposed be serious -- I mean, be sufficient to take into consideration the seriousness of the offense, the protection of society, your own needs to improve and to make sure that the sentence is sufficient but not excessive, and bearing in mind that the Probation Department concludes that in accordance with this

statute, a sentence substantially below the guidelines is appropriate. I'm imposing the same sentence on you as I have imposed on the two defendants in this case who have appeared before me already, although that sentence is somewhat below what the probation guideline recommends in your case.

In *Booker*, the Supreme Court held that mandatory guidelines based on judge-made findings violated the Sixth Amendment, but, after a severance analysis, ruled that the guidelines should be treated as [**6] "effectively advisory." 125 S. Ct. at 750-52, 757. The Court further stated that sentences would be reviewable for "reasonableness," and that this review would apply regardless of whether sentences fell within the advisory guidelines range. *Id.* at 765-66.

The sentencing court's discretion remains constrained by 18 U.S.C. § 3553(a) (2000), which requires courts to consider a number of factors in imposing sentences, *United States v. Pho*, 433 F.3d 53, 61-62 (1st Cir. 2006), including "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1), "the need for the sentence imposed," *Id.* § 3553(a)(2),[2] and "the [*4] need to avoid

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[2] In making this determination, courts must consider the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; "to afford adequate deterrence to criminal conduct"; "to protect the public from further crimes of the defendant"; and "to provide the defendant with needed

(continued...)

unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," *Id.* § 3553(a)(6).

[**7] The statute also requires courts to consider the sentencing range established by the guidelines. 18 U.S.C. § 3553(a)(4); accord *Booker*, 125 S. Ct. at 764-65. In *United States v. Jimenez-Beltre*, 440 F.3d 514, 2006 U.S. App. LEXIS 6580, 2006 WL 562154 (1st. Cir. 2006) (en banc), this court stated that the guidelines remained "an important consideration" because they represented the only "integration of the multiple factors" identified in the statute, often reflected past practice, and bore the imprimatur of the expert agency charged with developing them. 2006 U.S. App. LEXIS 6580, [WL] at *2-*3 (emphasis omitted).

For the same reasons, we said that a district court should normally begin with a guideline calculation, and that after considering departures, the district court should decide whether "other factors" (beyond the guidelines) warranted an ultimate sentence above or below the guideline range. *Jimenez-Beltre*, 2006 U.S. App. LEXIS 6580, 2006 WL 562154, at *3. As for review for reasonableness, we stressed the need for "a plausible explanation and a defensible overall result." 2006 U.S. App. LEXIS 6580, [WL] at *4. The "within the range" sentence involved in

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educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. 3553(a)(2)(A)-(D).

Jimnez-Beltre was easily affirmed. [**8] 2006 U.S. App. LEXIS 6580, [WL] at *3-*5.

The present case is more difficult. The sentence is not a modest variance from the guideline range, but less than half the minimum of the range. "The farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed." *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005) (Posner, J.). However, circumstances may make a major variance reasonable.

Here, the district court relied on six factors to distinguish this case: Smith's youth; his involvement in the offense "for a limited period of time"; the fact that Smith did not "appear to have been a leader"; the fact that Smith "appeared to have committed the crime to support [his] drug habit"; Smith's participation in drug abuse treatment and his subsequent employment; and the probation officer's suggestion that a "sentence substantially below the guidelines is appropriate."[3]

[**9] The government first argues that the district court committed legal error because some of the factors relied upon--such as age, drug use, lack of

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[3] The district judge also told Smith that he was "imposing the same sentence on you as I have imposed on the two defendants in this case who have appeared before me already." One of the defendants was sentenced to 46 months of imprisonment, while the other was sentenced to 57 months of imprisonment.

a leadership role, and post-offense rehabilitation--are "either discouraged or prohibited bases for departure" under the sentencing guidelines and circuit precedent. Legal errors are reviewed de novo and are themselves a basis for remand, *Pho*, 433 F.3d at 60-61, unless the error had no effect upon the sentence.

For the most part, the Commission's decision to discourage or exclude a factor seemingly rested either on a doubt whether the factor had much relevance to the statutory goals of sentencing or a concern that the factor was of a kind that tended to promote the inequality in sentencing that the guidelines aimed to reduce. U.S.S.G. 5H1.1, [*5] intro. cmt. (2005); *cf. Id.* 5K2.0, cmt. (backg'd). But, as we explained in *Jimenez-Beltre*, the guidelines are generalizations; the benefit of advisory guidelines is the room allowed for finer tuning. 2006 U.S. App. LEXIS 6580, 2006 WL 562154, at *3.

That a factor is discouraged or forbidden under the guidelines does not automatically make it irrelevant [**10] when a court is weighing the statutory factors apart from the guidelines. The guidelines--being advisory--are no longer decisive as to factors any more than as to results. About the best one can say for the government's argument is that reliance on a discounted or excluded factor may, like the extent of the variance, have some bearing on reasonableness.

The government also argues that the district court erred in relying on the pre-sentence recommendation of a sentence substantially below the guidelines range, contending that this factor is

"irrelevant" under section 3553(a). However, nothing in the statute forbids taking the probation officer's recommendation into account. A sentencing judge could reasonably consider the informed opinion of the officer in evaluating the section 3553(a) factors, see *United States v. Robinson*, 433 F.3d 31, 36 (1st Cir. 2005), although the weight accorded such an evaluation surely depends on the strength of the reasons given.

The government next argues that the district court erred in (allegedly) basing Smith's sentence on those of his co-defendants. The government says that this misconstrues section 3553(a)(6), which requires district [**11] courts to avoid creating "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The government argues that the "disparity" referenced in the statutory language refers only to variations from a national norm.

We agree that Congress' goal of equality primarily envisions a national norm; the guidelines were in some measure a response to disparities among sentences for like individuals in different parts of the country. *United States v. Wogan*, 938 F.2d 1446, 1449 (1st Cir. 1991), *cert. denied*, 502 U.S. 969, 112 S. Ct. 441, 116 L. Ed. 2d 460 (1991). In any event, the district judge in this case was apparently stressing his own consistency rather than supplying an independent justification of the 46 month sentence.

Having rejected the government's legal-error arguments, we turn now to its claim that the sentence was unreasonably low. In doing so, we do

not think that the district court made any clear error as to underlying fact warranting a remand. *Robinson*, 433 F.3d at 38 (sentence may be vacated if "predicated on a clearly erroneous view of material facts").[4] The issue, rather, is [**12] one of reasonableness: the plausibility of both the explanation and the result. *Jimenez-Beltre*, 2006 U.S. App. LEXIS 6580, 2006 WL 562154, at *4.

The first fact relied on by the district court-- Smith's youth--is a discouraged factor, but one that has a conventional appeal; among the concerns are that the crime may be a youthful aberration and that a young man may have a greater chance for rehabilitation. The district [*6] judge did not rely upon aberration-- Smith, after all, had participated in six crack transactions and had a substantial [**13] criminal history continuing over several years-- but the judge did express a hope of rehabilitation.

Yet Smith's criminal career has progressed fairly steadily toward more serious crimes (from license plate theft and marijuana possession, for example, to crack distribution near a school and playground). He served time in prison after violating the conditions of

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[4] The government says that the evidence did not support the district court's statements about drugs as a cause of Smith's crimes or his rehabilitation. A close reading indicates that the statements were quite qualified--that Smith "appeared" to have engaged in his crimes in order to support a drug habit, and, in treatment, "received positive reports," though he "had a couple of slips." The former statement, so qualified, has some basis in the PSR; the latter is a matter of characterization.

his probation stemming from his marijuana possession conviction, and it was soon after his release from that period of incarceration that he was arrested for the crime in question here.

The district judge also relied upon Smith's involvement in the present offenses "for a limited period of time." But Smith already had a significant criminal history; his first conviction (not necessarily his first crime) occurred more than three years before his crack transactions, which means that he was engaged in offenses from the age of 18 through the age of 21. During this period, he accumulated nine criminal history points, so his present offenses appear a further extension of his criminal history.

Further, the court said that Smith did not "appear to have been a leader," and this is true even though Smith progressed in the six transactions [**14] from aiding others to making his own sales. But the guideline calculations already account for this fact. U.S.S.G. 3B1.1 (2005). If there is some more specific aspect of his role that mitigates over and above the usual guideline sentence for an ordinary participant, which in principle could be true, it is not stated.

Finally, the district judge mentioned the potential contribution of drug addiction. The probation officer apparently said that the defendant "appeared to have committed" the crimes to support a drug habit. At sentencing, the district judge essentially echoed the probation officer's qualified statement about the role of Smith's drug problems in his crimes. The government argues that this finding was without basis, and the defendant does not point to any

specific facts on the record that support such a conclusion.

In any case, we note that Smith, as soon as he had completed his first phase of rehabilitation, immediately began to break the rules of the sober house, which resulted in the termination of his release. Regardless of the extent to which drug dependence may have played a role in his crimes, this relapse into misbehavior almost [**15] as soon as controls lessened does not speak well for his prospects of future self-control, whatever the cause for the relapse may have been.

We are hard-put to see any basis for finding this sentence reasonable. This is equally true if one turns from the facts relied upon by the district judge to the general considerations provided by the statute. Both vantages are pertinent in assessing reasonableness, and other circuits that have reviewed sentences for reasonableness have been willing to look at the matter from either end of the telescope. *See, e.g., United States v. Lazenby*, 439 F.3d 928, 2006 WL 569284, at *4-*5 (8th Cir. 2006); *United States v. Duhon*, 440 F.3d 711, 2006 U.S. App. LEXIS 3995, 2006 WL 367017, at *3-*8 (5th Cir. 006); *United States v. Moreland*, 437 F.3d 424, 436-37 (4th Cir. 2006).

The first sentencing factor is the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). Here, the offense involved repeatedly selling crack near a school and playground, and the defendant, although young, has accumulated a significant criminal [**16] history. Even [*7] after

some rehabilitation and while this case was pending, he was unable to conform to the rules of the sober house to which he was sent.

Three more factors, grouped together by the statute, are the seriousness of the offense, need for respect for law, and need for just punishment. 18 U.S.C. § 3553(a)(2)(A). Selling crack near facilities where children gather speaks directly to these factors. The offense, and the defendant's developing criminal career, is also pertinent, again in ways unhelpful to him, to two other statutory factors: the need "to afford adequate deterrence" and "to protect the public." *Id.* § 3553(a)(2)(B)-(C).

The statute also refers to the need "to provide the defendant with needed...medical care[ ] or other correctional treatment...." 18 U.S.C. 3553(a)(2)(D). If drug treatment is required by Smith, this can presumably be done whether the sentence is 46 months or a longer guideline sentence. The statute's language does not itself make drug addiction an extenuating circumstance, and in any event, as we have seen, there is no very clear evidence of a causal link between drug abuse [**17] and Smith's crimes in this case.

The next pertinent sentencing factor in the statute is the guideline range itself, 18 U.S.C. § 3553(a)(4)(A), which in turn is the principal means for complying with the last pertinent goal, namely, "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* 3553(a)(6). The factor in question--the guideline range--is obviously not one that supports the district court's

non-guideline sentence, and, to the extent that the guidelines are given force, pushes in the other direction.

In a nutshell, the offense is quite serious and the defendant's record unpromising, and there are no developed findings to indicate that rehabilitation is a better prospect than usual. A sentence less than half the minimum range appears to us plainly unreasonable. Although we are unhappy to disagree with the respected and experienced district judge in this case, we cannot sustain the sentence on the findings and explanation before us.[5]

[**18] The sentence is vacated and the case remanded for resentencing consistent with this decision. Framing a new sentence after any proceedings deemed appropriate is, in the first instance, the responsibility of the district judge.

It is so ordered.

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[5] *Compare United States v. Hampton*, 441 F.3d 284, 2006 U.S. App. LEXIS 7202, 2006 WL 724811, at *3-*4 (4th Cir. 2006); *Lazenby*, 439 F.3d 928, 2006 WL 569284 at *4-*5; *Duhon*, 2006 U.S. App. LEXIS 3995, 2006 WL 367017 at *3-*8; *Moreland*, 437 F.3d at 436-37; *United States v. McMannus*, 436 F.3d 871, 875 (8th Cir. 2006).

456 F.3d 211, *; 2006 U.S. App. LEXIS 18683, **

UNITED STATES OF AMERICA, Appellant, v. WILLIAM THURSTON, Defendant, Appellee.

No. 05-2271

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

456 F.3d 211; 2006 U.S. App. LEXIS 18683

July 26, 2006, Decided

PRIOR HISTORY: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Mark L. Wolf, U.S. District Judge. *Thurston v. United States*, 543 U.S. 1097, 125 S. Ct. 984, 160 L. Ed. 2d 988, 2005 U.S. LEXIS 972 (2005).

DISPOSITION: Vacated and remanded.

COUNSEL: Michael K. Loucks, First Assistant United States Attorney, with whom Michael J. Sullivan, United States Attorney, Dina Michael Chaitowitz, Chief of Appeals, and Susan G. Winkler, Chief, Health Care Fraud Unit, were on brief, for appellant. Joseph P. Kussoniello, with whom Matthew D. Brown and Cooley Godward LLP were on brief, for appellee. Daniel J. Popeo and Paul D. Kamenar, on brief for Washington Legal Foundation and Allied Educational Foundation, Amici Curiae. Miriam Conrad, Federal Public Defender and Judith Mitzner, Assistant Federal Public Defender, on brief for The Federal Public Defender for the Districts of

Massachusetts, New Hampshire, and Rhode Island, Amicus Curiae.

JUDGES: Before Boudin, Chief Judge, Lynch and Howard, Circuit Judges.

OPINION BY: HOWARD

OPINION

[*212] HOWARD, Circuit Judge. William Thurston was convicted of conspiring to defraud Medicare of over $5,000,000. Although the recommended sentence under the sentencing guidelines was 60 months' imprisonment, the district court instead imposed a sentence of three [**2] months' imprisonment. The government appeals, arguing that the sentence is unreasonable. The relevant background is as follows.

In 1998, Thurston was indicted for conspiring to commit Medicare fraud. *See* 18 U.S.C. § 371. The indictment stemmed from Thurston's activities in the late 1980s and early 1990s as an executive for Damon Clinical Laboratories (Damon), a corporation that supplied clinical laboratory testing services for health care providers. Medicare reimburses clinical laboratories only for services that are medically necessary for the treatment of the beneficiary's illness or condition. 42 U.S.C. § 1395(a)(1)(A). Thurston was indicted for conspiring with three others to manipulate Damon's service options to encourage physicians to order unnecessary tests for Medicare beneficiaries. In particular, the indictment

charged Thurston with conspiring to induce physicians to order rarely needed tests for ferritin and apolipoprotein by making them part of a battery of frequently ordered tests and informing physicians, falsely, that the tests did not cost extra. Prior to trial, the trial judge expressed skepticism about the government's [**3] case. At an April 2000 status conference for codefendant Joseph Isola, Damon's president, the judge stated that he would be inclined to impose a probationary sentence, even if the government could gain a conviction. Aware that the judge had more than once granted unappealable acquittals in similar cases, the government viewed its likelihood of gaining convictions and long sentences as remote. It therefore offered generous plea agreements to each of the defendants. In exchange for a plea of nolo contendere to a one-count information, the government offered to dismiss the indictment and not to appeal the sentence imposed (which the judge had indicated would not involve imprisonment).

Isola accepted the government's offer, but Thurston and another codefendant declined.[1] Thurston rejected the offer because a guilty plea "would cause him to be shunned in the Mormon church." At Isola's sentencing hearing, the government did not recommend a sentence, and the judge imposed a three-year term of probation.

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[1] In the interim, the fourth codefendant died.

[**4] Subsequently, the trial of Thurston's remaining codefendant ended when the judge entered a judgment of acquittal pursuant to Fed. R. Crim. P. 29. In December 2001, Thurston was convicted by a jury of conspiring to defraud Medicare by inducing [*213] the unnecessary ordering of the ferritin test.[2]

Thurston was first sentenced in May 2002. Applying the sentencing guidelines, the judge determined that the base offense level was six, that Thurston intended to defraud Medicare of more than $ 5,000,000 (a 14-level enhancement), that the crime involved more than minimal planning (a two-level enhancement), and that Thurston was an organizer or leader of extensive criminal activity (a four-level enhancement). The judge denied Thurston's request for an acceptance-of-responsibility adjustment and did not rule on the government's request for an obstruction-of-justice enhancement. The resulting adjusted [**5] offense level of 26 established a sentencing range of 63 to 78 months, which was trumped by a 60-month statutory maximum.

The judge departed from the guideline range and imposed a sentence of three months' imprisonment and twenty-four months' supervised release. He granted this departure for two reasons. First, he found that imposing a 60-month sentence on Thurston would result in an untoward disparity with the probationary sentence imposed on Isola, whom

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[2] The judge entered a Rule 29 judgment of acquittal on the apolipoprotein charge.

the court characterized as "the prime architect of the conspiracy." Second, he concluded that Thurston had demonstrated a record of "extraordinary contributions and service to society, and especially to his religious obligation."

Thurston appealed his conviction and the government cross-appealed the sentence. We affirmed the conviction but remanded for resentencing. *See United States v. Thurston*, 358 F.3d 51 (1st Cir. 2004) (*Thurston I*). Under the federal sentencing regime then in place, the sentencing court was required to impose a guideline sentence unless a downward departure was permitted.[3] *See* 18 U.S.C. § 3553(b). We concluded that the district court erred by granting [**6] Thurston a downward departure so that his sentence would be similar to Isola's. *Thurston*, 358 F.3d at 79. We ruled that a departure could not be granted because of the "perceived need to equalize sentencing outcomes for similarly situated co-defendants...." *Id.* We also concluded that the court had improperly granted Thurston a downward departure because of his good works. The guidelines permitted such departures only in cases where the defendant's good works "were exceptional." *Id.* at 78-79. While Thurston had a history of good works, such efforts could not be deemed extraordinary in light of both the nature of the offense and Thurston's status as a corporate executive with the means to undertake

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[3] At that time, we reviewed decisions to grant downward departures de novo. See 18 U.S.C. 3742(e), as amended by Pub. L. No. 108-21, § 401.

significant charitable endeavors. *Id.* at 79-80. We therefore remanded with instructions that the guideline sentence of 60-months' imprisonment be imposed. *Id.* at 82.

[**7] Thurston filed a petition for a writ of certiorari with the United States Supreme Court. While Thurston's petition was pending, two relevant events occurred. First, the trial judge recused himself because he could not impose the sentence "prescribed by the Court of Appeals." Second, the Supreme Court decided *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), which replaced the mandatory guideline regime with an advisory system. The Supreme Court subsequently granted Thurston's petition, vacated this court's judgment, and [*214] remanded for further consideration in light of Booker. *Thurston v. United States*, 543 U.S. 1097, 125 S. Ct. 984, 160 L. Ed. 2d 988, 2005 U.S. Lexis 972 (2005). After additional briefing, we remanded for resentencing and ordered that the court consider whether an obstruction-of-justice enhancement should be applied to Thurston's guideline range.

Following the reassignment of the case to the district court judge who issued the sentence challenged in this appeal, Thurston argued that he should receive the original sentence imposed because "unwarranted disparities between codefendants" and "good works" could be considered post-Booker. The government [**8] responded that Thurston should receive the 60-month sentence contemplated in *Thurston I*.

The district court expeditiously convened a hearing to determine Thurston's sentence. It began its analysis by accepting the findings made during Thurston's original sentencing and concluded that an obstruction-of-justice enhancement was not warranted.[4] After determining that the recommended guideline sentence was 60 months, the court considered whether a lower sentence was appropriate under the sentencing factors set forth in 18 U.S.C. § 3553(a). Among these factors are the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, to afford adequate deterrence, and to avoid unwarranted sentence disparities among defendants who have similar records and who have been found guilty of similar conduct. *Id.* § 3553(a)(2), (6).

[**9] The court began by finding that the disparity between Isola's sentence and Thurston's recommended sentence was unacceptable. As the court explained: Giving the prime architect of the scheme in this case [Isola] a sentence of probation and giving Mr. Thurston a sentence of 60 months, as the government advocates because he rejected a similar deal and exercised his right to a trial, would

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[4] Thurston argues that the district court was wrong to accept the enhancements imposed in the first sentencing on the ground that Booker raises the standard of proof for imposing guidelines enhancements from a preponderance of the evidence to beyond a reasonable doubt. We have rejected this argument. *E.g., United States v. Yeje-Cabrera*, 430 F.3d 1, 17 (1st Cir. 2005); *United States v. Antonakopoulos*, 399 F.3d 68, 80 (1st Cir. 2005).

greatly injure respect for the law unless the disparity is warranted by some legitimate consideration. Concluding that there were no material differences between Thurston and Isola other than Thurston's decision to exercise his right to a trial, the court ruled that this difference called for only a modest increase in Thurston's sentence: three-months' imprisonment.

The court next considered whether imposing a three-month sentence would adequately reflect the seriousness of Thurston's crime. It again viewed Isola's plea agreement and the similar offer to Thurston as the benchmark. According to the court, "implicit in the Isola plea agreement, and the same agreement or opportunity being offered to Mr. Thurston, was the government's view that the probationary sentence was minimally adequate [**10]...to reflect the seriousness of the offense." The court further explained: Medicare fraud...is a serious crime. And frequently...both the Guidelines and the government's recommendations are too low in white collar cases. However, the government's plea bargain with Isola and the offer it made to Mr. Thurston of . . . a probationary sentence are evidence that even a probationary sentence would adequately reflect the seriousness of the offense in this case.

Finally, the court considered whether a three-month sentence would adequately [*215] deter other potential white collar criminals. It concluded that a short prison term was adequate to serve this goal because "the most significant decision in sending a message to potential white collar criminals

is the decision to send the defendant to prison. It's not so much the amount of time, it's whether you go away."

After discussing the above-mentioned §3553(a) factors, the court sentenced Thurston to essentially the same sentence initially imposed -- three months' imprisonment and 24 months' supervised release.[5] n5 Because Thurston received credit for time served, the sentence did not require Thurston to serve any additional [**11] prison time.

The government appeals, arguing that the district court placed too much emphasis on the disparity between Isola's and Thurston's sentences. The government also argues that the court unreasonably undervalued the seriousness of Thurston's offense and the need to deter other white collar criminals.

Thurston's sentencing took place prior to our decision prescribing the post-*Booker* sentencing process. *See United States v. Jimenez-Beltre*, 440 F.3d 514, 518-19 (1st Cir. 2006) (en banc). Nevertheless, the district court anticipated the correct procedural approach. It calculated the applicable guideline range "before deciding whether to exercise [its] new-found discretion to impose a non-guidelines sentence" based on the § 3553(a) sentencing factors. It also provided a detailed explanation of its reasons for not imposing the recommended guidelines sentence. *Id.* The dispute in

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[5] The court added a $ 25,000 fine which was not part of the initial sentence.

this case centers not [**12] on the procedures employed, but on the substantive conclusion.

In reviewing a particular sentence for reasonableness, we stress the need "for a plausible explanation and a defensible overall result." *Id.* at 519. We also believe that the guidelines "remain[] an important consideration" in sentencing because they "represent[] the only integration of the multiple [sentencing] factors [set forth in § 3553(a)], often reflect past practice, and [bear] the imprimatur of the [Sentencing Commission], [the] expert agency charged with developing them." *United States v. Smith*, 445 F.3d 1, 4 (1st Cir. 2006). Thus, we consider the reasonableness of a below-guideline sentence on a sliding scale: "the farther the judge's sentence departs from the guidelines sentence the more compelling the justification based on the factors in § 3553(a) that the judge must offer...." *Id.* (quoting *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005)).

Here, the district court imposed a sentence 95% below the incarceration period recommended by the guidelines for essentially three reasons: (1) Thurston should receive a sentence [**13] close to Isola's because they are similarly situated codefendants and a wide disparity in their sentences would punish Thurston for electing to go to trial; (2) Thurston's offense was not terribly serious, as evidenced by the government's pretrial plea offer of a probationary sentence; and (3) a short prison term serves the interest of general deterrence because white collar criminals typically are more concerned about whether they will be sent to prison than the length of

imprisonment. The court approached Thurston's sentencing with characteristic thoroughness and without the benefit of our recent decisions applying Booker. We are constrained, however, to conclude that these reasons do not warrant the major variance challenged in this case.

We begin by considering the disparity between Isola and Thurston. In the pre-*Booker* [*216] era, codefendant disparities could not support a sentence below the guideline range. *See United States v. Wogan*, 938 F.2d 1446, 1448 (1st Cir. 1991). But after Booker "that a factor [was] discouraged or forbidden under the guidelines does not automatically make it irrelevant when a court is weighing the statutory factors apart [**14] from the guidelines." *Smith*, 445 F.3d at 5. That said, since Booker, we have observed that § 3553(a)(6) -- the factor relating to sentencing disparities -- was "almost certainly" enacted by Congress to encourage "a national uniformity focusing upon a common standard and looking to how most cases of the same kind were treated." *United States v. Saez*, 444 F.3d 15, 18 (1st Cir. 2006); *see also United States v. Navedo-Concepcion*, 450 F.3d 54, 2006 WL 1575573, at *5 (1st Cir. 2006) ("Congress's concern with disparities was mainly national"); Smith, 445 F.3d at 5 ("Congress' goal of equality primarily envisions a national norm"). Thus, one possible problem with the court's rationale was the emphasis on disparities between codefendants without giving significant consideration to encouraging nationwide uniformity in sentencing -- the primary focus of § 3553(a)(6). But, even if the emphasis on codefendant disparity was appropriate,

Isola and Thurston were not so similarly situated that nearly identical sentences were warranted. *See United States v. Ortiz-Torres*, 449 F.3d 61, 2006 WL 1452683, at *17 (1st Cir. 2006). In our view, the district court undervalued the fact that Isola pleaded nolo contendere.

"Plea bargaining flows from the mutuality of advantage to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). In order to gain a conviction without risking an unsuccessful trial, prosecutors frequently discount the sentence they offer in a plea bargain by the probability of loss. *See* Albert W. Aschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 58-60 (1968) (stating that "the overwhelming majority of prosecutors view the strength or weakness of the state's case as the most important factor in the task of bargaining"); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2470 (1994) ("The strength of the prosecution's case is the most important factor" in plea bargaining).

The record supports the government's argument that this is why Isola and Thurston were offered such favorable plea agreements. As noted above, the trial judge expressed doubts about the government's [**16] case and an inclination to impose a probationary sentence even if the government gained a conviction. Moreover, the government believed that the trial judge had a history of granting acquittals in similar cases.

Thurston had the opportunity to accept this offer but declined. Thurston's decision to go to trial entailed the risk of a stiffer post-conviction punishment. *See Yeje-Cabrera*, 430 F.3d 1, 25 (1st Cir. 2005). This is so because "after trial, the factors that may have indicated leniency as a consideration for the guilty plea are no longer present." *Alabama v. Smith*, 490 U.S. 794, 801, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Once Thurston elected to go trial, he was no longer situated similarly to Isola. The primary factor that led to Isola's light sentence -- the government's concern that it would not prevail at trial -- was no longer present.

The district court declined to consider this distinction material because, in its view, imposing a substantially harsher penalty on Thurston would impose a burden on Thurston's exercise of his constitutional right to a jury trial.[6] The law does [*217] not support this conclusion. "The fact that the defendant who pleads [**17] gets a benefit over those who go to trial and are convicted is a necessary artifact of any plea bargaining regime. The law long ago determined that there was nothing . . . illegal about any burden on trial rights caused by such a differential." *Yeje-Cabrera*, 430 F.3d at 25. In short, there was too much emphasis placed on Isola's sentence in determining the appropriate imprisonment period for Thurston. *Cf. Navedo-Concepcion*, 450 F.3d 54, 2006 WL 1575573, at *5.

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[6] The court did conclude that a small increase in Thurston's sentence was appropriate because his decision to go to trial caused additional expenditures by the government.

(concluding that the district court was reasonable in sentencing a defendant who went to trial to a longer sentence than codefendants who pleaded guilty because "defendants who plead guilty often get...lower sentences").

We turn next to whether a three-month sentence adequately reflected the seriousness of Thurston's crime. In considering this sentencing factor, [**18] the district court indicated that it agreed with our observation in *Thurston I* that "[h]ealth care fraud is a serious crime and the federal interest in combating it is powerful." 358 F.3d at 81. Nevertheless, the court concluded that a three-month sentence was appropriate because it represented the government's view of the seriousness of the offense. To reach this conclusion, the court relied on a sentencing guideline policy statement requiring that plea negotiation practices be conducted to "promote the statutory purposes of sentencing prescribed in 18 U.S.C. § 3553(a)." U.S.S.G. Part B, Intro. Comment. The court interpreted this policy statement to mean that, whenever the government offers a plea bargain, it is implicitly certifying that the proposed sentence adequately reflects the seriousness of the offense.

Sentencing is "primarily a judicial function." *United States v. Mistretta*, 488 U.S. 361, 390, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). This was the law both before and after the promulgation of the sentencing guidelines. *See* U.S.S.G. Part B, Intro ("[S]entencing is a judicial function . . . . This is a reaffirmation of [**19] a pre-guidelines practice."); S. Rep. 98-225 at 159, reprinted in 1984 U.S.C.C.A.N. 3342 (stating that placing the Sentencing

Commission in the judicial branch was based on the understanding that "sentencing should remain primarily a judicial function"). Sentencing remains a judicial function post-*Booker*. *See Jimenez-Beltre*, 440 F.3d at 518-19.

Judicial independence in sentencing is reflected in the rule governing the acceptance of pleas. Under Fed. R. Crim. P. 11(c)(3)(A), a sentencing court is empowered to reject any plea agreement which binds the court to impose a specific sentence if the court deems the sentence inappropriate. *See* C. Wright, *Federal Practice & Procedure*, § 175.1 at n. 38 (3d ed. 1999) (citing cases in which courts declined to accept plea agreements because of a disagreement with the agreed-to sentence). Post-*Booker* cases also emphasize the sentencing court's obligation independently to consider the § 3553(a) factors in arriving at the appropriate sentence. *See United States v. Buchanan*, 449 F.3d 731, 2006 WL 1450686, at *9 (6th Cir. 2006) [**20] (stating that courts must exercise "independent judgment" in imposing sentence); *United States v. Cooper*, 437 F.3d 324, 329 (3d Cir. 2006) (stating that courts must give "meaningful consideration to the § 3553(a) factors").

The government's lenient pretrial offer to Thurston did not relieve the district court of its independent obligation to assess the seriousness of Thurston's offense. The court suggested that the government undervalued the seriousness of Thurston's crime through its pretrial offer and then [*218] mistakenly deferred to its perception of the government's pretrial position. *See United States v. Lazenby*, 439 F.3d 928, 934 (8th Cir. 2006) ("Under

the Sentencing Reform Act and *Booker* sentencing discretion rests in the final analysis with the sentencing judge, not with the prosecution."); *United States v. Escobar Noble*, 653 F.2d 34, 36 (1st Cir. 1981) ("It is the particular function of the court, not the prosecutor, to say the last word about the justice of a sentence."). While the government's pretrial position might be relevant, a sentencing court ought not simply defer to the government's pretrial position, [**21] without taking into account the court's own expressed misgivings about the government's view or the government's explanation for its change in position.

Finally, we address the district court's deterrence rationale. As set forth above, the court concluded that a sentence imposing substantial prison time on Thurston would not promote general deterrence because white collar defendants typically are more concerned about whether they will go to prison than with the actual length of imprisonment.

This rationale is problematic in light of our recent post-Booker pronouncements. "The clear import of the statutory [sentencing] framework is to preserve Congress's authority over sentencing policy and to guarantee that the exercise of judicial discretion over sentencing decisions be based on case-specific circumstances, not on general, across-the-board policy considerations." *United States v. Pho*, 433 F.3d 53, 62 (1st Cir. 2006). Accordingly, post-*Booker*, "general disagreement with the broad-based policies enunciated by Congress or the Commission" do not justify imposing a sentence that is below the recommended guideline range. *Id.* at 65.

"One [**22] of the goals of the entire guidelines regime was to minimize discrepancies in the treatment of 'white collar' and 'blue collar' offenses." *Thurston I*, 358 F.3d at 80. From the outset of the guideline regime, the Sentencing Commission determined that the penalties for white collar crime had to be increased because of the inequity in the pre-guideline sentencing practice of "punishing economic crimes less severely than other apparently equivalent behavior." U.S.S.G., ch. 1, pt. A, § 3. In recent years, Congress has expressed concern that punishments for white collar offenses were too lenient. In 2002, Congress enacted the White Collar Crime Penalty Enhancements Act which, inter alia, instructed the Sentencing Commission to consider whether the sentencing "guidelines and policy statements . . . are sufficient to deter . . . [white collar] offenses" and to "modify the sentencing guidelines" accordingly. *See* Pub. L. No. 107-204, § 905(b)(1),(2). In response, the Commission increased the penalties and enhancements for certain white collar offenses. *See* 68 Fed. Reg. 2615-01 (2003); see also U.S.S.G. § 2B1.1 (2001) [**23] (setting forth the 2001 economic crime sentencing reforms which increased the guideline penalties and enhancements for white collar offenses).

The district court is not alone in viewing long prison sentences as unnecessary to deter white collar crimes. *See, e.g., United States v. Yeaman*, 248 F.3d 223, 238 (3d Cir. 2001) (Nygaard, J., dissenting in part); A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment & the Theory of Deterrence*, 28 J. Leg. Stud. 1, 12 (1999).

But, as expressed through the recommended guideline offense levels, this view is not shared by "Congress or the Commission, as its agent." *Pho*, 433 F.3d at 65.

A court may sentence below the guidelines because the guideline sentence appears unreasonable in the "particular [*219] case[]," *Jimenez-Beltre*, 440 F.3d at 518, but not because of "general disagreement with broad-based policies enunciated by Congress or the Commission." *Pho*, 433 F.3d at 65. Here, the court pointed to no facts concerning Thurston's offense or individual circumstances indicating that a three-month sentence would adequately [**24] deter similar crimes. *Cf. United States v. Rattoballi*, 452 F.3d 127, 2006 U.S. App. LEXIS 14940, 2006 WL 1699460, at *7 (2d Cir. 2006) (concluding that a below-guideline sentence for a white collar defendant was unreasonable where the district court imposed a lenient sentence based on characteristics common to all white collar defendants). Therefore, this was not an appropriate ground for reducing Thurston's sentence.

As demonstrated, the reasons provided do not support Thurston's receiving a sentence 95% below the guideline recommendation. Typically this conclusion would end the discussion, and we would remand for resentencing. *See Smith*, 445 F.3d at 7. But this case is atypical. Some of the conduct underlying Thurston's conviction is almost two decades old, and Thurston's sentence now has been vacated twice. We are concerned that vacating Thurston's sentence without providing further guidance might lead to another contentious district

court proceeding and a third appeal. This would benefit no one.

Two district judges have concluded that a sentence below the guideline recommendation is warranted in this case. While we think that there are plausible [**25] reasons to support a below-guideline sentence, these reasons do not permit the extreme variance that has been granted.

One ground supporting a below-guideline sentence could be that the intended loss attributed to Thurston overvalued the seriousness of his offense. This was a basis for a downward departure under the guidelines, *see United States v. Ravelo*, 370 F.3d 266, 275 (2d Cir. 2004), and remains relevant post-*Booker*, *see United States v. McBride*, 434 F.3d 470, 477 (6th Cir. 2006).

The trial judge found that Thurston intended a loss of over $5,000,000. "Much of Thurston's guideline sentence range...was driven" by this determination. *Thurston I*, 358 F.3d at 68. We concluded in *Thurston I* that the intended loss finding was sustainable, but believed that the issue presented a somewhat close question. *Id.* at 69. Unconstrained by the mandatory guideline regime, a sentencing court plausibly could conclude that a $5,000,0000 intended loss finding, with its resultant 14-level increase in the offense level, leads to a modest overstatement of the seriousness of Thurston's crime.

Another possible [**26] reason for a below-guideline sentence is Thurston's documented record of good works. This was one of the bases on which Thurston received a downward departure in his first

sentencing. We vacated that departure because a good works departure was impermissible unless the good works were "exceptional." *Thurston I*, 358 F.3d at 79. While we concluded that Thurston's endeavors were not "exceptional," we did acknowledge that "[s]ave for his crime, Thurston...lived a creditworthy life." *Thurston I*, 358 F.3d at 79. Post-*Booker*, a sentencing judge "could well conclude that a... discouraged factor[] did not quite justify a departure from the guidelines...but might justify a somewhat shorter sentence under a reasonableness standard." *United States v. Bradley*, 426 F.3d 54, 55-56 (1st Cir. 2005). Under this more flexible approach, Thurston's good works could justify a somewhat shorter sentence.

Isola's probationary sentence also could justify a somewhat reduced sentence. While Isola and Thurston were not similarly situated, we acknowledge the district court's concern that too wide a divergence [*220] between the sentence imposed [**27] on Isola and Thurston could negatively affect the public's "respect for the law." In administering the criminal justice system, it is important to "preserve the appearance of justice." *Cullen v. United States*, 194 F.3d 401, 408 (2d Cir. 1999). A sentencing court could plausibly conclude that extremely divergent sentences would undermine the accepted notion that similar conduct should be punished in a somewhat similar manner. *Cf. Lazenby*, 439 F.3d at 934 (recognizing that extreme disparities in the sentences imposed on coconspirators could "fail[] to promote respect for the law").

Balanced against these grounds for leniency are reasons for imposing a stiff penalty. Thurston committed a serious offense warranting substantial punishment. Medicare "fraud is a serious crime . . . [which] affects the financial integrity of [a] program[] meant to aid tens of millions of people in need of health care. Every dollar lost to fraud is a dollar that could have provided medical care to the elderly or the disabled." *Thurston I*, 358 F.3d at 81. Moreover, the recommended guidelines sentence is 60 months and, for the reasons articulated [**28] above, this variable remains an "important consideration" in identifying a reasonable sentence. *Jimenez-Beltre*, 440 F.3d at 518; supra at 9-10.

An appellate court is not well-suited to determine the appropriate sentence for a defendant. *See Smith*, 445 F.3d at 7 ("Framing a . . . sentence is, in the first instance, the responsibility of the district judge). But post-*Booker*, appellate courts are tasked with drawing the line separating reasonable from unreasonable sentences. *See Booker*, 543 U.S. at 263 (stating that "appellate judges will prove capable" of applying the "reasonableness" standard under advisory guidelines). Having reviewed the record, the recommended guideline sentence, and the § 3553(a) factors, we conclude that a sentence of fewer than 36 months' imprisonment would fail reasonableness review in the present circumstances. *See United States v. Moreland*, 437 F.3d 424, 437 (4th Cir. 2006) (vacating sentence imposed as unreasonable under Booker and remanding with instructions setting a floor for resentencing).

In setting the minimum sentence that could withstand reasonableness review, [**29] we are not endorsing 36 months as the correct sentence for Thurston. Indeed, given the seriousness of Thurston's offense and his role as an organizer and lead implementer of the fraud, this court would be inclined to impose a sentence at or near the guideline recommendation if it were acting as the sentencing court. But our role here is only to determine the minimum sentence that could be considered reasonable on the present record. Accordingly, we emphasize that in remanding for resentencing, we are not ordering that a 36-month sentence be imposed. The district court is free to solicit further argument and evidence from the parties, but, absent an extraordinary development, the court must impose a sentence of no less than 36-months' imprisonment.

Vacated and remanded.

Supreme Court, U.S.
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No. ( )

IN THE
Supreme Court of the United States

MICHAEL K.C. TOM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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12-21-07

No. 07-678

In the Supreme Court of the United States

MICHAEL K.C. TOM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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No. 07-678

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that the court of appeals erroneously applied a proportionality principle in reviewing his below-Guidelines sentence for reasonableness. In *Gall* v. *United States*, No. 06-7949 (Dec. 10, 2007), slip op. 8, this Court held that "appellate courts may * * * take the degree of variance into account and consider the extent of deviation from the Guidelines," but it rejected "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range" and "the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." Accordingly, the appropriate disposition is to grant certiorari, va-

cate the judgment of the court of appeals, and remand the case for further consideration in light of *Gall*.*

PAUL D. CLEMENT
Solicitor General

DECEMBER 2007

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* The government waives any further response to the petition unless this Court requests otherwise.